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LORETTA J. WAHL,
Petitioner,
and
DREW PERKINS,
Respondent.

MOTION TO DISQUALIFY
April 17, 2008

APPEARANCES:

For the Respondent: BRADFORD O. BAUGH,
Attorney at Law

Dawn Wood, C.S.R.
Official Court Reporter
Certificate No. 3115

San Jose, California

April 17, 2008

PROCEEDINGS

THE COURT: All right, and could counsel please state their appearances on line 2.

MR. HAMMON: Walter Hammon appearing on behalf of the Petitioner, Loretta Wahl.

MS. YEAMANS: Robin Yeamans also on behalf of Loretta Wahl, who I believe was going to appear by telephone.

THE COURT: Okay. Ms. Wahl, can you hear us?

THE PETITIONER: Yes, I can, Your Honor.

MR. BAUGH: Brad Baugh appearing for Mr. Perkins.

THE COURT: Okay. All right, and let me tell counsel what I've received and reviewed, just to make sure I have the entire universe of the entire submissions. And the original submission was filed, I believe, on April 7th.

MR. HAMMON: On what date?

THE COURT: April 7th, the file stamp is April 7th. It may have been submitted on an ex parte basis before that.

MR. HAMMON: Correct.

THE COURT: And I'm sure that it was because I signed the ex parte on April 4th, so it ultimately got file stamped April 7th, but probably submitted on maybe the 3rd, 2nd or 3rd, around that time frame.

MR. HAMMON: Yes, sir.

THE COURT: And that was Petitioner's Motion to

1 Disqualify Respondent's Counsel, and that packet included
2 the Order to Show Cause. There's a declaration of Ms. Wahl,
3 a Memorandum of Points and Authorities, a declaration of Mr.
4 Hammon, and that declaration had an Exhibit A attached, a
5 declaration of Ms. Dawn Revel, a declaration of Ms. Nicole
6 Ruiz, a declaration of Glynnis Lee Sundelius, and a
7 declaration of Robin Yeamans; and I believe Ms. Yeamans'
8 declaration had an Exhibit A attached as well.

9 Then on April 3rd, I think still in connection
10 with the ex parte nature of the application, Mr. Baugh filed
11 a packet, Responsive Declaration to the Order to Show Cause,
12 with points and authorities and his declaration in
13 connection with those points and authorities, also a
14 declaration of Chris Gill. And then there was some proposed
15 orders, an Exhibit A, I believe Exhibits A through E
16 originally, and I believe attached to that, and maybe
17 there's some additional declarations which I think were
18 copied from Petitioner's submission, so that was essentially
19 the packet which was stapled which was file stamped on April
20 3rd.

21 Then more recently, on April 14th we received a
22 packet from Petitioner, a supplemental reply, Memorandum of
23 Points and Authorities, and a supplemental declaration of
24 Mr. Hammon with an Exhibit A, a supplemental declaration of
25 the Petitioner, Dr. Wahl, with an Exhibit A, and I believe
26 that was the sum total of that essentially second
27 submission.

28 And then I received a courtesy copy from Mr.

1 Baugh yesterday and in that packet, there's a Responsive
2 Declaration to the Order to Show Cause, and an attachment to
3 it with argument and points and authorities. And I believe
4 that was it for that submission.

5 MR. BAUGH: There were two declarations
6 attached, Your Honor.

7 THE COURT: Okay, let me make sure I got both of
8 those. Okay, yes, there's a declaration of Chris Gill and a
9 declaration of Drew Perkins, and some attachments to that
10 packet.

11 And then finally, I think this morning I
12 received a reply declaration of Nicole Ruiz, paralegal to
13 Mr. Hammon, and also one Exhibit A to that, and also a reply
14 declaration of Dr. Wahl in support of the Motion to
15 Disqualify, a reply declaration of Ms. Yeamans, and a reply
16 declaration of Richard Flamm, F-l-a-m-m.

17 MR. HAMMON: Judge, you -- in your recitation of
18 what you reviewed, you did not reference the original
19 declaration of Richard Flamm that was filed on April 4th,
20 2008. The supplemental reply was submitted yesterday, I
21 wanted to make sure that you got the April 4th filing of
22 attorney Richard Flamm.

23 THE COURT: Okay, and I -- I may have and I just
24 -- let me make sure that's in the packet. And that was in
25 your initial ex parte packet?

26 MR. HAMMON: It was not in the initial ex parte;
27 in other words, the ex parte was submitted as you correctly
28 indicated on Thursday, the 3rd of April. There was some

1 suggestion that you were going to be making different types
2 of rulings on Friday, so we submitted that declaration on
3 Friday, the 4th of April.

4 THE COURT: Okay.

5 MR. HAMMON: And it was filed on that date.

6 THE COURT: Okay. I don't -- yeah, I'm not
7 seeing that.

8 MR. HAMMON: I have a copy I can provide you.

9 THE COURT: Okay, yes, if you could give that
10 copy to the deputy.

11 So with that recitation, is that everything
12 that's been submitted?

13 MR. BAUGH: There's a declaration in the
14 material that was submitted to you yesterday, it's in the
15 body, by me.

16 THE COURT: Okay.

17 MR. BAUGH: You had recited --

18 THE COURT: Was that --

19 MR. BAUGH: At the back of the points and
20 authorities.

21 THE COURT: Okay. Let me make sure that I
22 reviewed that, okay. And is that declaration the one that
23 is on page 4 of the Responsive Declaration?

24 MR. BAUGH: It is, Your Honor.

25 THE COURT: So within the body of the
26 submission?

27 MR. BAUGH: Uh-huh.

28 THE COURT: Okay, I did review that. So what I

1 have not reviewed because the paperwork that came in this
2 morning, or that was received this morning in an envelope, I
3 just had this morning just time to start in on it and to
4 look at the reply declaration of Nicole Ruiz, so I haven't
5 gotten to the reply declaration of Loretta Wahl, attorney
6 Yeamans, Richard Flamm. And then I wasn't aware that there
7 was an original declaration of Flamm. So if you want me, I
8 can skim those now, we can proceed with argument and I do
9 want to look at those.

10 Just as a preface, with respect to the way this
11 got calendared, when counsel brought it up, and I know there
12 were different interpretations of what happened at the last
13 court date, and I think part of the problem was I wasn't
14 completely aware of exactly what was coming via the ex
15 parte. And so when I did receive the ex parte, I thought
16 that it raised fairly significant issues so I wanted to at
17 least give the parties an opportunity to have a hearing.

18 So I apologize if there was any confusion based
19 on that and I know, Mr. Baugh, that you're supposed to be on
20 vacation today, and I apologize for that as well. A date
21 was set by the court to have a hearing where you could air
22 your views and also I'm mindful there's a trial date set
23 that's coming up, and because I denied any temporary orders,
24 I wanted to try to get this resolved.

25 And Mr. Baugh, I'm not sure in terms of the
26 Notice of Unavailability, I know counsel are aware of those,
27 but the court sometimes is not, even though you file these
28 things. I'm not sure there's an internal procedure to deal

1 with that.

2 MR. BAUGH: It's done.

3 THE COURT: You've raised a good issue and I'm
4 going to look into that.

5 So here we are today. What I can do is quickly
6 skim the stuff that I haven't been able to look at, give you
7 a chance to argue. I do anticipate that unfortunately
8 you're not going to get a decision today because of the
9 volume of material and the legal issues that have been
10 raised and just the bulk of the material, and I want to give
11 you a reasoned decision on the matter. So why don't you
12 just give me a few minutes to skim this and then I think you
13 know what I've had more time to read, I'll give you all a
14 chance to argue and then we'll decide where to go next. I
15 don't think the decision will take more than a few days but
16 I do want to have a chance to review everything after I've
17 heard what you have to say. So just give me a moment to
18 take a look at the newer submissions.

19 (Brief pause in the proceedings.)

20 THE COURT: All right, thanks for your patience,
21 I've had a chance to look at the material that was
22 submitted.

23 MR. HAMMON: Judge, did you have a chance to
24 look at Mr. Flamm's declaration of April 4th?

25 THE COURT: Yes. And in fact, I -- now that I
26 read it, I realize that I have read it before, I just
27 couldn't locate it in the initial pleadings, but I do
28 recognize that I read it when you first submitted the ex

1 parte.

2 MR. HAMMON: For the Court's information, Mr.
3 Flamm is in court if there are any questions by the Court of
4 Mr. Flamm as well as the other witnesses are available by
5 phone, they've been served subpoenas.

6 THE COURT: And that raises the issue of what
7 kind of hearing this should be and in the Complex Asbestos
8 Litigation case, the Court of Appeal noted that in most
9 cases, an evidentiary hearing would not be required. There
10 are exceptions and I thought there was at least some
11 consensus among the attorneys that for purposes of this
12 motion, that it would be decided essentially on the papers
13 and argument.

14 Is there any objection to that? In other words,
15 is there a request for the Court to take actual live
16 evidence by either party?

17 MR. HAMMON: On behalf of the Petitioner, there
18 is not as long as you have read all of the pleadings that
19 have been submitted that you referenced.

20 THE COURT: Okay.

21 MR. BAUGH: Agreed, Your Honor.

22 MS. YEAMANS: Your Honor, if I may, I have to
23 take a deposition so at 10:00 I'll be leaving.

24 THE COURT: Okay, that's fine.

25 MS. YEAMANS: Thank you.

26 THE COURT: So let's just hear the argument
27 based on the documents that you've submitted and we'll start
28 with the moving party.

1 MR. HAMMON: Judge, we are here as a result of
2 the ex parte application that we submitted on April 3rd.
3 The issue that's presented concerns the assurance that the
4 confidential communications between an attorney and a client
5 are always to be protected. A protection of the
6 confidential communications is for all times. The ethical
7 rules that lawyers have to work with require permanent
8 confidentiality, it's not partial confidentiality, it's not
9 for only periods of time. The Farris versus Firemans Funds
10 case addresses the point that it is confidentiality for all
11 times. Business & Professions Code Section 6068 paren (e)
12 requires that every lawyer must maintain every confidence of
13 a client, at every peril to himself to preserve all of the
14 secrets of a client, and preserve the confidentiality of the
15 client.

16 The same rule is applicable to paralegals.
17 Business & Professions Code Section 6453 creates the same
18 duty for paralegals as applies to attorneys. Paralegals
19 must maintain inviolate the confidentiality of clients.
20 They have the same responsibilities. If this matter
21 involved an attorney changing firms from one side to the
22 other, there is an irrebuttable presumption that the firm
23 must be disqualified.

24 The issues we don't believe are significantly
25 different, but the case that you just referred to, In re
26 Complex Asbestos Litigation, we believe is the controlling
27 case, is on point, and tells us what you need to do with
28 this case. You have no choice but you have to disqualify

1 counsel for the Respondent.

2 When you look at what we're talking about, we're
3 talking about a paralegal, a paralegal who's working on
4 behalf of my client along with my cocounsel. A paralegal's
5 responsibilities are set forth in Business & Professions
6 Code Section 6450. Paralegals are people who are trained,
7 who perform substantial legal work. They do substantial
8 legal work by definition of the Business & Professions Code
9 under the supervision of a lawyer. That's exactly what this
10 paralegal did.

11 As has been indicated in the paperwork
12 submitted, she was the paralegal assigned to the case at Ms.
13 Schlepphorst's office. On the billings there are 25
14 separate and distinct entries of this paralegal and work she
15 did on this particular case. That is work she did that were
16 included on the billings, not things that were not included
17 on the billings that she did. There are over seven hours of
18 time recorded on the billings to my client of what this
19 paralegal did; not what the lawyer did, what the paralegal
20 did. There are over 20 communications of my client to Ms.
21 Schlepphorst. There are over ten communications of my
22 client to Ms. Gill. There are communications from myself to
23 Ms. Gill. There are references that Ms. Gill met with me,
24 that I met with Ms. Gill, that we planned, we did strategy
25 sessions with Ms. Schlepphorst and Ms. Gill.

26 There are 17 separate e-mails between Ms. Gill
27 and Ms. Schlepphorst. There are 24 e-mails going the other
28 way between Ms. Schlepphorst and Ms. Gill. She referenced

1 knowledge about this case in 2006 when she consulted with
2 another paralegal -- excuse me, another lawyer in this
3 matter who is involved on behalf of the Petitioner.

4 I don't think there's any question at all what
5 my client was expecting of the paralegal at Ms.
6 Schlepphorst's office. She was expecting that everything
7 she said would remain confidential. She was expecting that
8 anything that she said would not ever be repeated to the
9 Respondent and/or Respondent's counsel.

10 We now look at Ms. Gill and her status now. She
11 remains a paralegal. She is a paralegal in the law offices
12 of the Respondent's counsel. She is the paralegal who was
13 assigned to this case. She's the paralegal who's been at
14 the office for a period of time working on this case. I
15 don't think there's any question that Ms. Gill was the
16 paralegal with confidential information from my client, from
17 myself, from my client's counsel when she worked in the
18 Schlepphorst office. She also was the paralegal at current
19 counsel's office.

20 The rule that's set forth in the case of In re
21 Complex Asbestos Litigation I think is relatively clear, I
22 think it's applicable and directly on point to this matter.
23 There is a rebuttable presumption of disqualification and
24 that rebuttable presumption can only be rebutted if there is
25 either a written agreement waiving the issue, if my client
26 waived the conflict, the presumption would be rebutted, or
27 if there is a formal screening that has been achieved so
28 that the paralegal has not had and will not have any

1 confidential information.

2 There's two important provisions of that
3 language. The paralegal must not have had and will not have
4 any confidential communication, any involvement in the
5 matter. In this particular matter, there's some suggestion
6 that a screen has been put up after notice was given.
7 That's too late, Judge. She already has had involvement in
8 this case.

9 She -- there has not been an effective screen.
10 There was a responsibility of all involved to have made
11 certain there was not this conflict; there was a
12 responsibility of everybody involved. Ms. Schlepphorst's
13 name appears in this file. Ms. Gill knows of her
14 involvement in this case and she elected to begin working on
15 the other side.

16 What this issue really is about is my client's
17 position as to the integrity of the attorney/client
18 relationship. This is a very important significant issue.
19 If someone is allowed to talk with an attorney or a
20 paralegal and then have their information relayed onto the
21 other side, it puts at great risk the integrity of that
22 relationship. It puts at great risk the integrity of the
23 legal system.

24 The situation being presented now is that Ms.
25 Chris Gill is no longer working on this case in a one-lawyer
26 office where her sister is now the paralegal. I don't think
27 that is preserving the integrity of the attorney/client
28 relationship.

1 I don't think that is what the court was looking
2 at in the Complex Asbestos Litigation case.

3 The minute --

4 THE COURT: Let me ask you a question on Complex
5 Asbestos, I'm looking at the opinion, the Cal. App. 3d
6 version, at page 596.

7 MR. HAMMON: Yes.

8 THE COURT: Heading is: Protecting
9 Confidentiality, the Rule for Disqualification. And toward
10 the end of that heading, it lays -- sets forth the rule, you
11 know, talks about the rebuttable presumption. "Once this
12 showing has been made, a rebuttable presumption arises that
13 the information has been used or disclosed in the current
14 employment." Then it goes on and says, "To rebut the
15 presumption, the challenged attorney has the burden of
16 showing that the practical effect of formal screening has
17 been achieved."

18 Now, that seems to suggest that even if there
19 hasn't been -- obviously no waiver, even if there hasn't
20 been a formal screening procedure, if a party can show that
21 the practical effect of formal screening has been achieved
22 through some other means, then there's a way around the
23 presumption.

24 So are you saying that it's either waive or
25 formal screen and there's nothing else that can help?

26 MR. HAMMON: Judge, what I am saying is first of
27 all, I think the language that you're relying on or
28 referring is exactly what I was talking about. It says the

1 showing must satisfy the trial court that the employee has
2 not had and will not have any involvement with the
3 litigation. This paralegal has had involvement with the
4 litigation at Respondent's counsel's office. She was the
5 paralegal, she has been involved. To set up a screening
6 after the fact does not satisfy the obligation.

7 THE COURT: Okay, but finishing that sentence in
8 Complex Asbestos, "The showing must satisfy the trial court
9 that the employee has not had and will not have any
10 involvement with the litigation, or any communication with
11 attorneys or coemployees concerning the litigation, that
12 would support a reasonable inference that the information
13 has been used or disclosed." So that's an important
14 qualifier. If it were just no involvement, no
15 communication, that would be an easy bright-line rule. But
16 it goes on, and that involvement has to support a reasonable
17 inference that the information has been used or disclosed.

18 So for example, if a firm were to hire a
19 paralegal and send them to their Beijing office for the
20 first two months working on a separate case, maybe a firm
21 could make -- absent -- and there was no formal screening in
22 place, just by virtue of circumstance, a firm maybe could
23 come in and say, there's no way that there could have been
24 any information used or disclosed. So it seems like there
25 is a little bit of wiggle room there.

26 MR. HAMMON: And Judge, I don't disagree under
27 the factual pattern that you just suggested but we're
28 dealing with a very different set of facts in this matter.

1 We're dealing with a one-lawyer office, a one-person office,
2 with a paralegal and her sister being the other paralegal in
3 the office. We're dealing with a situation where this
4 person was the paralegal to this case. We're dealing with
5 three separate people have told you that -- in declaration
6 form that she was the paralegal assigned to this case,
7 handling this matter.

8 When one looks at the issues, and that's what we
9 tried to put in the paperwork we submitted, as to the issues
10 that are being dealt with now, many of them are the exact
11 same issues that show up on the billings of Ms. Gill when
12 she previously was involved in the matter. They involve the
13 exact same issues that are being litigated today. They're
14 not issues that have come up involving the same people,
15 they're involving the exact same matters that were being
16 dealt with by Ms. Gill. They're involving issues of Dr.
17 Leslie Packer, they're involving issues of Shannon Jones,
18 they're involving issues of the school where the children
19 attend. It's dealing with the exact same issues all over
20 again.

21 THE COURT: And that --

22 MR. HAMMON: And I think if you look at the
23 paperwork that's been submitted, Respondent's counsel
24 indicates that the paralegal has worked on all cases, so
25 you're assigned to a case, both paralegals working on the
26 case. I don't think there's any way that the Court could
27 reasonably infer that there was any lack of information
28 available to everybody in the office.

1 THE COURT: And we'll hear from Mr. Baugh in a
2 while, but he submitted the declaration of Chris Gill and
3 the declaration I'm looking at is in I believe the most
4 recent submission, attached to the Responsive Declaration.
5 And in paragraph 1, Chris Gill declares, "... I have never
6 discussed anything about this case with Mr. Baugh other than
7 scheduling very minor administrative matters." So that's
8 essentially rebuttal effort number one, which is there has
9 been no communication.

10 And then Ms. Gill goes on to say, "... I can
11 recall nothing about what anybody ever said to me at any
12 time, not surprisingly, from 2002," referencing
13 conversations with Ms. Wahl. So there are two efforts to
14 rebut. One is, I didn't talk to Mr. Baugh about the case;
15 two is, I don't remember anything about the case, so there's
16 no way I could have said anything.

17 MR. HAMMON: Two comments. The first is when
18 she says she doesn't remember anything about the case and
19 then we find out in 2006 she talked to another lawyer and
20 remembered the case and remembered the case well and
21 remembered her client, our client, Ms. Wahl, who she's now
22 on the other side of, I think, Judge, when you finish
23 looking at the Complex Litigation case, Asbestos Litigation,
24 and you look on page -- end of 593 and top of 594 -- I'm
25 sorry, end of 594, the protecting confidentiality, the cone
26 of silence, it talks about the most likely means of
27 rebutting the presumption is to implement a procedure before
28 the employee is hired. You don't do it after the fact.

1 It is not our burden to show everything that's
2 in their head, that would be an impossibility to do, Judge.
3 We could never do that. We would never be able to show what
4 they have and what they don't have. The critical issue,
5 Judge, is there is a paralegal who had very significant
6 involvement in the matter, who had confidential
7 communication, who is now working on the other side of the
8 case. It's just simply wrong. It significantly attacks the
9 integrity of the attorney/client relationship or the court
10 system. There's no way around it. It's not our burden to
11 show what they have or what they don't have or what they
12 know or what has been disclosed.

13 THE COURT: All right, thank you.

14 MS. YEAMANS: I'm going to have to leave, I
15 wondered if I could make two points as an appellate law
16 specialist.

17 THE COURT: Sure.

18 MS. YEAMANS: Two points: First of all, there
19 is -- in our papers we have raised the argument that as a
20 point of first impression, the enactment of the Business &
21 Professions Code section which Mr. Hammon cited, which is
22 6453, changes the result of Complex Asbestos and brings the
23 ir -- makes the presumption of shared confidences
24 irrebuttable and brings the law that applies to attorneys
25 into effect for paralegals and would make the presumption
26 nonrebuttable, and that's raised in the papers.

27 THE COURT: Okay, there's no case that really
28 says that, I mean --

1 MS. YEAMANS: Not yet, no, I agree with that.

2 THE COURT: Okay.

3 MS. YEAMANS: And the other thing would be that
4 if the -- if your decision was not in our favor, we would
5 request a stay of all proceedings pending appeal because we
6 have obtained Garrett Daily to represent us on appeal and we
7 are taking this issue, you know, extremely seriously.
8 Certainly our client is very concerned about what's
9 happened. And we would really like to see the matter
10 straightened out. She's feeling extremely betrayed and I'm
11 sure Your Honor can understand that, and I'm going to have
12 to leave now.

13 THE COURT: Thank you.

14 MS. YEAMANS: Thank you.

15 THE COURT: All right. Then why don't we turn
16 to Mr. Baugh.

17 MR. BAUGH: Thank you, Your Honor. In this
18 particular case, Ms. Chris Gill is the sister of Marianne
19 Gill, who has been working for me for 16 years. Her last --
20 apparently Ms. Wahl's last contact with the Schlepphorst
21 office was either late 2002 or early 2003. Paralegals don't
22 carry conflicts lists, at least there's no authority cited
23 by the moving party, and in the same situation we are when
24 we asked, what did you say in 2002? Now, any person with
25 honesty has to say, I have no idea what I said in 2002 or
26 what anybody said to me, I'm going to have to go look at a
27 file.

28 Ms. Gill -- Ms. Chris Gill, better keep it

1 distinct, Ms. Chris Gill comes and there's a screen process.
2 We have the green cards which have the name, last names of
3 each party. And as her declaration states, we went through
4 every green card. You recognize this name, do you recognize
5 that name? Now, no one has explained when someone says, I
6 don't recognize the name, that you say, well, I should set
7 up a wall, because it's illogic. If they say, I don't
8 recognize any of these names, there's nothing to do.

9 Clearly there is a duty to inquire, but that, as
10 we've shown in our declarations, is met. And I keep
11 hastening back to apparently this was 2002, 2003. Then what
12 happens is, as you know from the exhibits, she doesn't work
13 on it at all. In fact, she's -- is not, was not then and is
14 not now, the paralegal working on the case.

15 What happens is that Jack Gill gets sick in
16 February and eventually dies. During that time period, as
17 -- who is the father of both. Heck, I was doing the filing.
18 We had days when there was nobody in the office other than
19 myself and the receptionist and one of them had to spend
20 some time there, and you can see it was minimal effort that
21 was done and it's 99 percent scheduling, are we going to get
22 this person here, that person there.

23 This motion itself arises from events in 2006
24 and 2007. There is a comment by Mr. Hammon that their
25 attorney said there was a contact in 2006. I didn't see a
26 declaration by that attorney and if that's being alleged, I
27 think there's a hearsay problem with that. And the Court
28 may not consider Mr. Hammon's statement and some other

1 attorney who's not a declarant after we've had -- who have
2 no evidence that that conversation ever took place; can't
3 now be considered.

4 Mr. Hammon also erroneously said she was the
5 paralegal assigned to this case. That as the Court knows
6 from the billing is simply false, it's objectively false.
7 Marianne Gill has been working on this case until the
8 illness and death of Jack Gill. During the illness and
9 death of Jack Gill, very -- whoever came in had to work on
10 everything because there were all kinds of things that had
11 to be scheduled. Nothing of any substance did anyone have
12 any time frankly to do. Ms. --

13 THE COURT: But I guess -- how do you make that
14 distinction between a paralegal's duties, what is
15 substantive as opposed to more of in the matter of a
16 clerical task?

17 MR. BAUGH: I think scheduling an appointment,
18 making sure that an expert can fly out is very mundane and
19 does not involve anything but the most cursory matters. It
20 was done frankly because we're shorthanded. Marianne was
21 out for about three -- well, after the death of her father,
22 their father, she took two solid weeks off and before that,
23 both of them were gone a lot. Because -- well, I won't go
24 into the details but if you've gone through the death of a
25 close parent, it's not a pleasant experience for anybody to
26 undergo.

27 In -- and now we get the ex parte and my first
28 thing is, you know, when in doubt, lock down. So everything

1 has been moved, it is a one-attorney office where we have
2 lots of offices, the files that we have are in a locked file
3 cabinet that only Marianne and I have access to, literally.
4 The receptionist can't get into it at this point. But I
5 can't get somebody -- when somebody tells me, I don't
6 recognize those names, there's nothing to do.

7 And I would say there's circumstantial evidence
8 that steps would have been taken had it occurred, and
9 ironically, Ms. Wahl has provided it to us. If someone says
10 to me, I have confidential information, what do I do? Put
11 it in a sealed envelope, sign off on it, turn it over to the
12 other side. I don't even want to look at it. When through
13 an inadvertence, apparently, while this is pending, on April
14 4th, Ms. Wahl decided to send a letter, apparently
15 addressed, "Dear Robin." I didn't have to hear anything
16 more. I'll tell you what you're going to do, you're going
17 to prepare a declaration, you put it in a sealed envelope.

18 So if Ms. -- I think that is circumstantial
19 evidence that if Ms. Gill had said, I recognize those names,
20 we'd go to a totally different step. But throughout this
21 process, she puts in her declaration, I don't remember
22 anything. And candidly, if I had somebody tell me that they
23 remember -- I believe it's six months with the Schlepphorst
24 firm, something like that, of all the cases that come in and
25 somebody said, I remember what somebody told me about a case
26 in 2002, 2003, they have a much better memory than I have
27 because I can't do that and I have conflicts to register.

28 I have experiences where I can't tell -- when

1 somebody calls me up, I can't remember which gender I
2 represented, what the issue was, or anything like that.

3 And this motion is about what happened in -- I
4 don't know if you have Dr. Gordon's report, but it's about
5 the events in 2005 at the earliest, 2006 and 2007. The
6 report was issued in September of 2007.

7 Ms. Wahl says her association with the
8 Schlepphorst firm ended sometime early 2003. So the core
9 events of the change of circumstance have to be from the
10 last court order in 2004, 2005. So it's literally
11 chronologically impossible that Ms. Gill could have heard
12 anything germane to this case.

13 And I invite the Court to think of the tactical
14 issue that is raised in Maruman, M-a-r-u-m-a-n, and I think
15 -- but we all agree on Complex Asbestos and we all agree on
16 this, I think, there's no case talk -- in Complex Asbestos,
17 the paralegal literally walked down the street and the next
18 day was working for the other attorney.

19 Look at the number of law firms Ms. Gill went
20 through. There was -- and by the way, Complex Asbestos,
21 there was no screening process. There is no case that says
22 paralegals have to have a conflicts register, they rely on
23 memory alone. They -- they -- and once -- and there is in
24 the circumstances the weighing of -- in this case, the court
25 -- I think Complex says there's a weighing of factors that
26 goes on, the court considers all kinds of things, and
27 Justice Premo, who apparently did not know of the argument
28 of Ms. Yeamans' events, says that's the correct balance we

1 look -- we weigh all of the factors and we see, you know,
2 with this -- this case coming up now, we have had --
3 depositions of all our experts are going to be done today,
4 finished. Their experts are still Thursday, Friday and
5 actually we're taking one on Saturday of Mr. Tippins. Ms.
6 Yeamans made the comment in her declaration, it's a trial
7 tactic to go on vacation. I've arranged Mr. Tippins to fly
8 out from New York and to take these depositions today,
9 tomorrow, Friday and Saturday as part of my trial tactic to
10 delay the process of the case. I mean, it's illogical.

11 But, I think when the Court weighs the facts of
12 this case, and this case is certainly -- I have been unable
13 to find a case about a paralegal who worked on a case five
14 and a half years ago and came in and said, I don't recognize
15 any of these names, and we made sure that you got the
16 accounting of time spent and the subject matter for in
17 camera review if there's any doubt about that. Absolutely
18 didn't work on it at all in January, no, not one thing.

19 What happens, and what's the only reason, and
20 put it in the totality of events, the father of both sisters
21 sickens and dies. It's a madhouse; I mean, believe me, I
22 lived through it, it's -- it's very, very hard. And you're
23 just trying to get people from -- in from the east coast
24 here on the same day, that's 99 percent of it. And there is
25 no conference with me; I mean, because there's nothing --
26 there wasn't anything -- I didn't know to ask her anything.

27 THE COURT: So if the passage of time at some
28 point cures the possible conflict, why would there be a need

1 for any sort of screening at all? I mean, let's say you had
2 a five-year rule, a ten-year rule.

3 MR. BAUGH: Because --

4 THE COURT: Couldn't you just hire a paralegal
5 and say, well, nobody's ever going to remember after ten
6 years so there's no reason to screen?

7 MR. BAUGH: No, I think you do have to screen
8 and we did.

9 THE COURT: So why -- well, but you didn't
10 screen at the outset.

11 MR. BAUGH: No, I did.

12 THE COURT: Well, you did. I guess when I say
13 "screen," I mean, put -- once you have knowledge of -- and I
14 think in your most recent submissions you basically said
15 that now that you know what has been raised by Petitioner,
16 you've put in essentially a wall within your firm.

17 MR. BAUGH: Right.

18 THE COURT: Albeit that it's -- you're
19 essentially a solo practitioner, to effectively keep Chris
20 Gill away from any of this litigation material.

21 MR. BAUGH: Yeah.

22 THE COURT: So why do you need to do that? If
23 Chris Gill forgot, has no independent recollection, what's
24 the point?

25 MR. BAUGH: I think if she has no independent
26 recollection, you're right. But I'm going to be cautious,
27 just like I was when I saw the "Dear Robin," I'm not going
28 to look at it to see if it's something important, the better

1 -- I want to be careful and when something -- why -- why
2 keep -- isn't it easier to try and fix it? I mean, the
3 other thing would have been to say -- for example, let's go
4 to the fax that Ms. Wahl decided to send to Drew Perkins.
5 Oh, but there's -- you know, how do we fix this? What's the
6 proper way to handle what we presume is an inadvertent
7 disclosure of a communication? Well, you know, you can't
8 undo the fax, but you can make sure I don't see it and you
9 make sure it gets sealed up and -- you know, and somebody
10 says -- gives you a lot of recall material after the fact,
11 you have no records, you have no files on your desk,
12 anything. Now, I'm looking at this file and you said, do
13 you remember and I start -- that sort of thing starts coming
14 into the office, I want her out, you know. I don't want her
15 to have anything jogged with that, so I'm going to cut,
16 block her off. I don't want any -- any chance that she can
17 recover memory like most people do when you read a document.

18 THE COURT: And what -- you know, if you're
19 arguing for -- for example, a passage-of-time rule, what's
20 the appropriate amount of time? You're saying five years is
21 enough?

22 MR. BAUGH: You know -- no, I'm not saying it's
23 necessarily the time, it's the content, what are the
24 communications like. For example, no offense, if I say, I'm
25 going to shoot you, you're going to remember that maybe for
26 the rest of your life, okay. But I say, you know, the case
27 of In re Marriage of Epstein to a nonfamily law judge, you
28 ask him two years later what is the name of the case you

1 cited, I don't know. It's not just the passage of time, I
2 think that's -- that would be too arbitrary and that's why
3 the cases talk about weight. It's what is the content. If
4 someone -- I still remember people trying to shoot me in
5 southeast Asia, I have a vivid memory of that. I don't have
6 a vivid memory of what happened last year, but they are
7 different things.

8 THE COURT: Right, but does that require that
9 the court make an individualized analysis of a paralegal's
10 memory? I mean, if Ms. Gill has a photographic memory, then
11 it would seem that the five-year rule, five years is not
12 enough and maybe nothing is enough.

13 MR. BAUGH: Oh, yes, if someone came in and says
14 she has a photographic memory, but I think you bring the
15 human experience and it does -- does -- I mean, let's talk
16 about the specific case. While my father is dying am I
17 thinking heavily about any case? I mean, what is the human
18 experience? I don't think it's, gee, I wonder what I could
19 do on a case that I'm -- that I can't even remember. I
20 mean, their minds were on other things, and is that likely
21 to be true or not.

22 THE COURT: All right, thank you. Any response?

23 MR. HAMMON: Judge, I'm very sympathetic to the
24 death of someone's family member, I'm sympathetic to Mr.
25 Baugh being in Vietnam and been shot at, but the issues
26 we're talking about today are very important and very
27 significant issues. The issue with regards to
28 confidentiality of information that attorneys get from a

1 client or that an attorney gives to a client is to be
2 confidential for all times. It's not a five-year or
3 two-year or ten-year, it is for all times.

4 The ethical obligation requires permanent
5 confidentiality, not partial confidentiality, not for a
6 certain limited period of time. And I think that in this
7 matter there was not proper screening at the time of the
8 hiring of Ms. Gill, either on Ms. Gill's part or on the
9 firm's part. They could have gone through each case, they
10 could have looked and seen who the attorneys were previously
11 and they would have seen that the Schlepphorst office was
12 involved.

13 I think the case law is -- some of the cases
14 make it clear that you can't rely on a trust me type defense
15 in place of adequate screening at the outset. You also
16 can't rely on a trust me defense to avoid having appropriate
17 screening within the office to keep a person out of any
18 involvement in the matter.

19 I think that because -- after all, this has been
20 brought to everybody's attention, and when we found out
21 about Chris Gill being the paralegal on the other side of
22 the case, we brought it to the attention of counsel for the
23 Respondent immediately, and then what was done? A screen
24 was put up. They knew that she had confidential
25 information, they knew that she had to be screened out of
26 this case. She's already too involved in this case. You've
27 seen several declarations where she has been identified as
28 the paralegal in this case. There's -- you'll see three

1 separate references to that in the paperwork that's been
2 submitted. That's why I think it's so important that the
3 Court remember what the requirements of a paralegal are. A
4 paralegal is a trained person to perform substantial legal
5 work. We're not talking about a secretary who's not a
6 trained person, we're not talking about a receptionist,
7 we're talking about someone who is an expert, someone who is
8 credentialed, someone with years of experience.

9 My client has the right to rely on her
10 attorney/client privilege, she has the right to rely on the
11 integrity of the court system and the attorney/client
12 relationship and there's no option the Court has other than
13 to disqualify Respondent's counsel.

14 We are asking, Judge, that there be a stay of
15 all proceedings in this matter as indicated by counsel Robin
16 Yeamans.

17 THE COURT: Yes, final words.

18 MR. BAUGH: I suppose we'll hire Mr. Wolf, but I
19 don't think there's a ground for a stay. In fact, it's not
20 even in the request before the Court, but on top of that, I
21 disagree with Mr. Hammon. The Complex case does not say as
22 he argues, it says -- and again, even on its face, it
23 doesn't have the fact pattern that exists here. What it is
24 at the heart of Complex is that you weigh the matters and I
25 think a five-and-a-half-year-time lapse, a screening at the
26 beginning and every effort that the case law talks about is
27 sufficient and I further believe, if you may recall what's
28 in there, you'll find that effectively what Ms. Gill did was

1 secretarial work.

2 When you look, it's calling -- but even that
3 aside, it's during an approximately five-week time period
4 when there is a health catastrophe involving both paralegals
5 and where most of them are out at the time. There is
6 nothing of substance. She categorically denies, you know --
7 I mean, I would agree she has to deny that she told me
8 anything because she says she doesn't remember anything, so
9 how would you tell me something if you don't remember
10 anything. It's illogical. And the Complex case clearly
11 says that with respect to legal staff, which is favorably
12 cited by Justice Premo in the 2007 case, these rules --
13 those rules -- these are much different rules and the court
14 does a weighing process.

15 And I understand that Petitioner would love
16 nothing more than to put this case off because essentially
17 that means they win, and -- but I don't think that's what
18 the Court should do.

19 MR. HAMMON: Judge, I would just remind the
20 Court that what was said about Ms. Gill at the Schlepphorst
21 office was that she was just a secretary there and I think
22 when you look at all that she did, she was working as a
23 paralegal in this case, she was doing significant issues.

24 The case law that was submitted and the
25 declaration of our expert, Mr. Flamm, talks about the issue
26 of someone saying, I don't recall, I don't -- that is not an
27 acceptable response to it, it's not an acceptable response
28 as the case law indicates, the trust me defense. I don't

1 think there's any possible way out other than the
2 disqualification.

3 MR. BAUGH: I again would refer the Court to the
4 circumstantial evidence of the inadvertent fax as to what
5 people do and proof of the pudding is in the --

6 MR. HAMMON: I would ask, Judge, that you review
7 the P&A's of Mr. Flamm's declaration as an expert in this
8 field. Thank you very much.

9 THE COURT: Is the issue submitted?

10 MR. BAUGH: Submitted.

11 MR. HAMMON: On behalf of the Petitioner, it is
12 submitted, Judge.

13 THE COURT: I'm thinking -- I'm not sure if you
14 want to come back or if you want to simply be told when I
15 make an order. Is there a preference? I think I can --
16 I'll have a decision by I would say close of business
17 Tuesday, the 22nd. So the options are: If you want, I
18 could simply have my clerk notify you and send you the
19 decision, and/or if you want to actually come the 23rd at 9
20 o'clock, we have a law and motion calendar, I could take it
21 at the beginning.

22 MR. BAUGH: We're taking depositions in this
23 case.

24 MR. HAMMON: I think it might make sense that it
25 be faxed out if you and your clerk are willing.

26 THE COURT: So we'll fax it out no later than
27 close of business Tuesday.

28 MR. HAMMON: Thank you very much, Your Honor.